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Collective Bargaining Agreements, Arbitration Provisions and Employment Discrimination Claims: Compulsory Arbitration or Judicial Remedy - Johnson v. Bodine Electric Co.

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NOTES

Collective Bargaining Agreements, Arbitration Provisions and Employment Discrimination Claims: Compulsory Arbitration or Judicial Remedy?

Johnson v. Bodine Electric Co.[1]

I. INTRODUCTION

With the recent explosion of employment discrimination litigation has come an increase in the desirability of arbitration to resolve them. The inclusion of mandatory arbitration clauses in collective bargaining agreements would appear to close the door to the courthouse for unionized workers claiming job discrimination. Federal courts, however, have seen things differently.

This casenote addresses the effect of mandatory arbitration provisions in collective bargaining agreements ("CBA") upon statutory anti-discrimination claims. Disputes in this area arise when an employee joins a union, thus becoming subject to a CBA negotiated between the union and the employees. What often happens is that the CBA will generally contain a clause calling for arbitration of all claims arising under the agreement. Later, if the employee believes he has been subjected to discriminatory practices on the part of the employer and seeks remedies under anti-discrimination laws, such as Title VII, the employer will move to compel arbitration. The issue in such cases is whether an employee loses the right to pursue a judicial remedy by joining a union governed by a CBA.

The United States Supreme Court has twice addressed the enforceability of agreements to arbitrate employment discrimination claims and the cases are at odds with each other.[2] By distinguishing these two cases, the Court is able to retain both opinions as good law, but in the process, much confusion has been created for lower federal courts, practitioners, employers and employees. Federal case law in this area is encompassed by two distinct views. The minority view asserts that arbitration of statutory claims is required under the CBA. The vast majority of courts, by contrast, hold that an employee in the situation described above is not required to arbitrate statutory discrimination claims. The majority view recognizes the protection that is

1. 142 F.3d 363 (7th Cir. 1998).
2. *Compare* Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), *with* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

needed for unionized workers and the inherent conflict between arbitration under a CBA and employment discrimination rights. This view, which allows an employee to pursue judicial remedies for statutory claims, necessarily leads to more of these claims being filed in courts, not with arbitrators. While this result seems inconsistent with the liberal federal policy favoring arbitration, it correctly balances the interests at stake. While arbitration is more efficient and cost-effective, these goals are outweighed by the need to protect employees' rights under employment discrimination statutes.

II. FACTS AND HOLDING

When Cleotis Johnson ("Johnson") moved to Illinois, he joined the International Brotherhood of Electrical Workers ("IBEW") Local 601, where he was classified as an out-of-town union member.[3] This status meant that local union members would receive preference for jobs before Johnson, and Johnson would be subject to lay-offs before the other members.[4] Membership for one year was required in order to achieve local member status.[5] Johnson secured work with Bodine Electric Co. ("Bodine") through Local 601.[6] Johnson claimed he was subjected to a "racially discriminatory hostile work environment" while working for Bodine, eventually leading to being laid-off from that job, one month before achieving local member status.[7]

Johnson's employment with Bodine was covered by a CBA.[8] The CBA was entered into between Local 601 and the local chapter of the National Electrical Contractor's Association (NECA), of which Bodine is a member.[9] A grievance provision of the CBA provided for arbitration of disputes.[10]

Johnson filed suit against Bodine under Title VII of the Civil Rights Act of 1964, bypassing the grievance procedure in the CBA.[11] Johnson alleged that he was subjected to discrimination on the job and laid off because of his race.[12] The United States District Court for the Central District of Illinois dismissed Johnson's suit for

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3. Johnson v. Bodine Elec. Co., 142 F.3d 363, 364 (7th Cir. 1998).
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.* at 365.
10. *Id.* The grievance provisions states that:
> All grievances or questions in dispute shall be adjusted by the duly authorized representatives of each of the parties to this Agreement. In the event that these two are unable to adjust any matter within 48 hours, they shall refer the same to the Labor-Management Committee. The Labor-Management Committee, a six member creation of the CBA, is composed of three union representatives and three management representatives. The Committee decides issues by majority vote. If the Committee fails "to agree or to adjust any matter, such shall then be referred to the Council on Industrial Relations (CIR) for the Electrical Contracting Industry for adjudication."

Id.
11. *Id.*
12. *Id.* at 364.

lack of subject matter jurisdiction, stating that, "Johnson had not exhausted the grievance procedures mandated by the collective bargaining agreement between Local 601 and Bodine."[13]

Johnson appealed this decision to the United States Court of Appeals for the Seventh Circuit.[14] The appellate court held that Johnson was not compelled to arbitrate his Title VII claim, despite the presence of the arbitration provision in the CBA.[15] Although Johnson's claim partially addressed the lay-off procedures contained in the CBA, the majority of his claim was founded upon federal statutory rights, specifically his rights under Title VII.[16] When an employee joins a union and becomes a party to a CBA with a mandatory arbitration clause, he will not be forced to arbitrate discrimination claims under Title VII. An employee is only required to arbitrate those disputes that he specifically contracts to arbitrate.

III. LEGAL BACKGROUND

The issue of the effect of mandatory arbitration clauses in collective bargaining agreements upon an employee's claim of discrimination has been frequently litigated in the federal courts. Although the issue is not fully settled, a look at the progeny of cases resulting from the United States Supreme Court decision in *Alexander v. Gardner-Denver Co.*[17] is useful in determining the future path of the law in this particular area.

In *Alexander*, the plaintiff was an African-American man who alleged violation of Title VII.[18] Pursuant to a CBA, he submitted his claims to an arbitrator, who ruled against him. He then sued in federal court under Title VII, and his former employer sought to dismiss the suit based on the previous arbitration proceeding. The district and appellate court ruled for the employer, holding that Alexander was bound by the arbitrator's decision. The United States Supreme Court reversed. First, the Supreme Court found that where a CBA contains language providing for nondiscrimination by the employer similar to Title VII, an employee has two separate remedies for the alleged discrimination, the CBA and Title VII.[19] The court's reasoning was based upon the distinct and separate nature of the two rights being protected: contractual and statutory.[20] Next, the court noted that arbitration is inferior to the judicial process in protecting and adjudicating Title VII rights.[21] Several reasons were articulated for this part of the holding, including: the specialized competence of arbitrators in the internal laws of the workplace and not the external laws of society, the superior fact-finding process that occurs in the courtroom, the lack of a complete record in arbitration, the lack of rules of evidence in arbitration, and aspects of civil

13. *Id.*
14. *Id.* at 365.
15. *Id.* at 367.
16. *Id.* at 366.
17. 415 U.S. 36 (1974).
18. *Id.* at 38-39.
19. *Id.* at 52.
20. *Id.* at 50.
21. *Id.* at 56.

trials not present or limited in arbitration, such as discovery, compulsory process, cross-examination, and testimony under oath.[22] Finally, the court stated that the mandatory arbitration clause could not constitute a waiver of judicial remedies.

The state of the law after *Alexander* was that an employee could pursue both arbitration and judicial remedies for employment discrimination claims. This state of affairs continued until the court decided *Gilmer v. Interstate/Johnson Lane Corp.*[23] The Court's decision in *Gilmer* caused great confusion in this area of the law. In *Gilmer*, the Court rejected most of the reasoning which underlay *Alexander*, but did not expressly overrule it. Instead, the Court created a clever distinction.

In *Gilmer*, the plaintiff was a securities salesman, and he was required to register with several securities exchanges, including the New York Stock Exchange ("NYSE").[24] The NYSE had a mandatory arbitration clause.[25] Gilmer was fired and subsequently brought suit in federal court under the Age Discrimination in Employment Act ("ADEA").[26] The district court ruled for Gilmer, finding that he did not need to arbitrate his discrimination claim, resting its decision on *Alexander.* The court of appeals reversed and the United States Supreme Court upheld the appellate court's ruling.

The court noted that mistrust of arbitration procedures and recognition of its inferiority, which are evident in the *Alexander* opinion, should be reconsidered. The court stated that, "[a]lthough those procedures [in arbitration] might not be as extensive as in the federal courts, by agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'"[27] Thus, the court held that Gilmer was required to arbitrate his statutory rights under the ADEA.

The Supreme Court attempted to distinguish *Gilmer* from *Alexander* in three ways. First, the *Gilmer* court stated that *Alexander* did not address the effect of mandatory arbitration clauses on statutory claims, but, rather, whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims.[28] Second, the *Gilmer* court found that in *Alexander*, the employee was represented by his union in the arbitration proceeding, thus presenting a conflict between individual and collective representation.[29] This conflict was not present in the later case because Gilmer represented himself. Third, the *Gilmer* court distinguished the two cases on the basis of the Federal Arbitration Act ("FAA"), which was applicable in *Gilmer*, but not in *Alexander.*[30] The FAA evidences a liberal federal policy favoring

22. *Id.* at 57-58.
23. 500 U.S. 20 (1991).
24. *Id.* at 23. The registration application required Gilmer "to arbitrate any dispute, claim or controversy arising between him and [his employer] that is required to be arbitrated under the rules, constitutions, or bylaws of the organizations with which [he] register[ed]." *Id.*
25. *Id.* The NYSE required the "arbitration of any controversy between a registered representative and any . . . member organization arising out of the employment or termination of employment of such registered representative." *Id.*
26. *Id.* at 23-24.
27. *Id.* at 31.
28. *Id.* at 35.
29. *Id.*
30. *Id.*

arbitration agreements, thus leading to the decision to uphold the arbitration of Gilmer's claim.[31]

Since *Gilmer*, seven circuits have addressed the question of whether a CBA can compel an employee to arbitrate his claims under federal anti-discrimination statutes and these seven circuits have had to determine how to reconcile *Alexander* and *Gilmer*. The majority of circuits have held that mandatory arbitration clauses in a CBA are not applicable to statutory claims such as those under anti-discrimination laws. Siding with the majority are the Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits.[32] The Fourth Circuit has clearly sided with the minority and upheld the arbitration of these statutory claims.[33] The Third Circuit originally followed the Fourth, but that opinion was later withdrawn, and it is unclear whether it sides with the majority or minority.[34]

The Eighth Circuit discussed this issue in *Varner v. National Super Markets, Inc.*[35] In this case, the plaintiff sued her employer in federal district court for violations of Title VII and a state civil rights statute. The plaintiff was successful at the district court level and the employer appealed, claiming that the plaintiff had failed to pursue her arbitration remedy under a CBA before bringing suit in court.[36] Citing *Alexander*, the court of appeals ruled that the employee was not barred from bringing a judicial action to resolve her Title VII claim.[37]

The Seventh Circuit found the arbitrability issue before it in *Pryner v. Tractor Supply Co.*[38] First, the court noted that judicial remedies may be available when an employee first pursues arbitration and his statutory remedies are not fully vindicated in that forum.[39] Next, the Seventh Circuit expressed concern over the ability of the union to institute the grievance procedures under a CBA, but not giving employees the same right. An employee cannot have confidence as to whether his claim will even be pursued in arbitration because unions exercise a great amount of discretion over whether to bring a grievance and because a court, when reviewing this discretion, is required to lend deference to the union's decision.[40] The court also discussed the conflict between majority and minority rights. Majority rights are recognized in the CBA, which is approved by a majority of workers. Minority

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31. *Id.*

32. *See* Penny v. United Parcel Serv., 128 F.3d 408 (6th Cir. 1997); Brisentine v. Stone & Webster Eng'g Corp., 117 F.3d 519 (11th Cir. 1997); Harrison v. Eddy Potash, Inc., 112 F.3d 1437 (10th Cir. 1997), *vacated*, 158 F.3d 1371 (10th Cir. 1998); Pryner v. Tractor Supply Co., 109 F.3d 354 (7th Cir. 1997); Varner v. National Supermarkets, Inc., 94 F.3d 1209 (8th Cir. 1996).

33. *See* Brown v. Trans World Airlines, 127 F.3d 337 (4th Cir. 1997); Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875 (4th Cir. 1996).

34. *See* Martin v. Dana Corp., No. 96-1746, 1997 WL 313054, at *8-9 (3d Cir. June 12, 1997), *reversed*, 135 F.3d 765 (3d Cir. 1997).

35. 94 F.3d 1209 (8th Cir. 1996).

36. *Id.* at 1213.

37. *Id.*

38. 109 F.3d 354 (7th Cir. 1997).

39. *Id.* at 361. The [employers] concede that to the extent that the rights conferred by the collective bargaining agreements, or the sanctions available to the arbitrators, fall short of fully vindicating the plaintiffs' substantive and remedial statutory rights, the plaintiffs will be free to resume their suits after the arbitrators render their awards, having filed the suits within the statute of limitations. *Id.*

40. *Id.* at 362.

rights, however, are protected by anti-discriminatory statutes such as Title VII. The court stated:

> We may assume that the union will not engage in actionable discrimination against minority workers. But we may not assume that it will be highly sensitive to their special interests, which are interests protected by Title VII and the other discrimination statutes and will seek to vindicate those interests with maximum vigor.[41]

Finally, the *Pryner* court summed up its ruling by stating that "[a]ll we are holding is that the union cannot consent for the employee by signing a collective bargaining agreement that consigns the enforcement of statutory rights to the union-controlled grievance and arbitration machinery created by the agreement."[42]

In *Harrison v. Eddy Potash, Inc.*,[43] the Tenth Circuit ruled that the federal district court had jurisdiction over the plaintiff's Title VII sexual harassment claim, notwithstanding the fact that the plaintiff failed to pursue her remedies under the mandatory grievance procedure in a CBA.[44] In arriving at its decision, the court first noted the distinction, recognized in *Alexander*, between statutory and contractual rights.[45] Second, the court found that *Gilmer* is distinguishable from the present case. In *Gilmer*, the FAA was controlling, but the Tenth Circuit has ruled that the FAA does not apply to collective bargaining agreements.[46]

The Eleventh Circuit looked into this issue in *Brisentine v. Stone & Webster Engineering Corp.*[47] and ruled that an alleged violation of the Americans With Disabilities Act ("ADA") could be litigated regardless of a mandatory arbitration clause in a CBA. In summary, the court found that a mandatory arbitration clause does not bar litigation of a statutory claim, unless three requirements are met.[48] First, the employee must individually agree to waive this right.[49] Second, the agreement must give the arbitrator specific authority to resolve federal statutory claims.[50] Finally, the CBA must give the employee the right to institute arbitration procedures if his or her federal statutory claim is not resolved satisfactorily in the grievance procedure.[51]

Presented with a different factual situation than any of the above cases was the Sixth Circuit in *Penny v. United Parcel Service*.[52] The arbitration clause in this case specifically referred to rights protected by the ADA, the federal statute under which the plaintiff was suing. Thus, although the arbitrator could have resolved the ADA statutory rights of the plaintiff, the Sixth Circuit ruled that the plaintiff was entitled

41. *Id.* at 362-63.
42. *Id.* at 363.
43. 112 F.3d. 1437 (10th Cir. 1997), *vacated*, 158 F.3d 1371 (10th Cir. 1998).
44. *Id.* at 1453.
45. *Id.* at 1454.
46. *Id.*
47. 117 F.3d 519 (11th Cir. 1997).
48. *Id.* at 526.
49. *Id.*
50. *Id.* at 527.
51. *Id.*
52. 128 F.3d 408 (6th Cir. 1997).

to bring suit in federal court despite the CBA provision. The reason for this ruling, articulated by the court, was that the grievance procedure was solely available after invocation by the employer or union, but was not available at the insistence of the employee.[53] For the Sixth Circuit, the importance of an employee being able to compel arbitration was the controlling factor in determining whether the mandatory arbitration provision of the CBA barred judicial suits of employment discrimination claims.

Only two circuits have ruled that the mandatory arbitration provisions of the CBA require employees to arbitrate their discrimination claims. In *Martin v. Dana Corp.*, the Third Circuit ruled that arbitration of a Title VII discrimination claim under a CBA was proper because the CBA in this case expressly included statutory claims and granted individual employees the opportunity to compel arbitration.[54] However, this opinion was later withdrawn and vacated. The state of the law in the Third Circuit is, therefore unclear, but it appears as if an employee will not be compelled to arbitrate employment discrimination claims due to a mandatory arbitration provision in the CBA.

In 1996, the Fourth Circuit ruled in *Austin v. Owens-Brockway Glass Container, Inc.*[55] that *Gilmer* effectively overruled *Alexander*. The plaintiff sued her employer for violations of Title VII and the ADA, failing to invoke the mandatory arbitration clause in the CBA. The majority opinion ruled that:

> [w]hether the dispute arises under a contract of employment growing out of securities registration application, a simple employment contract, or a collective bargaining agreement, an agreement has yet been made to arbitrate the dispute. So long as the agreement is voluntary, it is valid, and we are of opinion it should be enforced.[56]

In advancing its opinion that *Gilmer* overruled *Alexander*, the Fourth Circuit gave three reasons for its conclusion. First, *Gilmer* states that an employee is not foregoing the substantive rights available to her when she arbitrates; she is merely submitting them to an arbitral, rather than a judicial, forum.[57] This is in direct contradiction to the holding in *Alexander* that Title VII claims should not be decided in an arbitral forum.[58] Second, the Fourth Circuit argued that the passage of the ADA and the Civil Rights Act of 1991 and their legislative histories supports the view that an agreement to arbitrate will be enforced unless there is an indication of congressional intent to preclude the waiver of a judicial forum.[59] The court found no such preclusion or congressional intent in their inquiry. Finally, the court argued

53. *Id.* at 412.
54. No. 96-1746, 1997 WL 313054, at *8-9 (3d Cir. June 12, 1997), *reversed*, 135 F.3d 765 (3d Cir. 1997).
55. 78 F.3d 875 (4th Cir. 1996).
56. *Id.* at 885.
57. *Id.* at 880.
58. *Id.*
59. *Id.* at 880-81.

that the post-*Gilmer* case law supported the conclusion reached by the Fourth Circuit.[60]

Because *Austin* is the only case that compels arbitration of employment discrimination claims under a CBA's mandatory arbitration provision, much criticism has been levied against it. "The Fourth Circuit's approach to the issue misinterprets the law as set forth by the Supreme Court and demonstrates a lack of understanding of the operation of the grievance and arbitration procedure in the collective bargaining context."[61] First and foremost, the Fourth Circuit rules, in effect, that *Gilmer* overrules *Alexander*, but this is a proposition that the United States Supreme Court, in its *Gilmer* opinion, refused to consider. The Supreme Court has said: "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the court of appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."[62] The next criticism focuses on the opinion's reliance upon congressional intent in the ADA and Civil Rights Act of 1991 ("the Act"). The Fourth Circuit delves into the congressional intent of the legislators who worked and voted on the Act, and concludes that there is a preference for arbitration evidenced in it. However, it is not important whether Congress preferred arbitration over adjudication, but rather whether it meant to preclude a waiver of the judicial remedy in the Act.[63] In looking at intent, a provision of the legislative history of the Act is "encouraging the use of alternative means of dispute resolution to supplement, rather than supplant, the rights and remedies provided by Title VII."[64] Finally, the Fourth Circuit cites a number of post-*Gilmer* decisions that support its conclusion.[65] However, none of the cases it cites involve collective bargaining agreements, but rather cases where employees made agreements to arbitrate with their employers.[66] Individual agreements were not the issue presented to the court in *Austin*, thus the conclusion that their decision is buttressed by other opinions is simply without merit.[67]

The Fourth Circuit reaffirmed its ruling in *Austin* with *Brown v. Trans World Airlines*, but found that an employee was not required to arbitrate a sexual harassment claim under Title VII.[68] The Fourth Circuit's "decision vividly illustrates the critical significance of the language used in arbitration clauses."[69] The court found that the arbitration clause was not broad enough to include statutory claims,

60. *Id.* at 882.

61. Ann C. Hodges, *Protecting Unionized Employees Against Discrimination: The Fourth Circuit's Misinterpretation of Supreme Court Precedent*, 2 EMPLOYEE RTS. & EMPLOYMENT POL'Y J. 123, 124 (1998).

62. Rodriguez de Quijas v. Shearson/American Express Inc., 490 U.S. 477, 484 (1989).

63. Harvey R. Boller & Donald J. Petersen, *Job Discrimination Claims Under Collective Bargaining*, DISP. RESOL. J., Aug. 1998, at 45.

64. *Id.* at 46.

65. *Id.* at 47.

66. *Id.*

67. *Id.*

68. 127 F.3d 337 (4th Cir. 1997).

69. Boller & Petersen, *supra* note 63, at 47.

like Title VII.[70] The employee was thus allowed to pursue judicial remedies for the sexual harassment claims. The Fourth Circuit went on to state that parties are free to agree to arbitrate all disputes out of the employment relationship, including statutory and contractual rights, without needing to include a specific statute, such as Title VII, ADEA, or ADA.[71] The differences between *Austin* and *Brown* were pointed out in this opinion. Where the arbitration clause in *Austin* was broad enough to cover statutory claims, the employee was made to arbitrate. In *Brown*, when the union tried to draft a narrow arbitration clause and failed to include Title VII statutory claims, the employee was allowed to pursue judicial remedies. The court noted in *Brown* that "the agreement does not purport to submit any noncontract-based dispute or any statutory dispute to arbitration. In this regard, the language in the agreement before us is significantly narrower than the language construed in . . . *Austin*."[72] Although reaching different conclusions in the two cases, the Fourth Circuit still adheres to the minority rule. Where the mandatory arbitration clause is broad and covers all disputes arising out of the employment relationship, an employee must arbitrate statutory claims.

The Fourth Circuit's interpretation of this area of the law has been reviewed by the United States Supreme Court. The high Court granted certiorari in *Wright v. Universal Maritime Service Corp.*[73] In *Wright*, the Fourth Circuit followed its opinion in *Austin* and found that "collective bargaining agreements to arbitrate employment disputes are binding upon individual employees even when the dispute involves a federal cause of action."[74] The court found the arbitration clause to be particularly broad, but Wright argued that since the ADA was not specifically mentioned in the agreement, he could not be made to arbitrate these claims.[75] The court rejected that argument stating, "[a]n employer need not provide a laundry list of potential disputes in order for them to be covered by an arbitration clause."[76] The Fourth Circuit affirmed the dismissal of Wright's suit for failure to pursue his remedies under the CBA. On October 7, 1998, the U.S. Supreme Court heard oral arguments in this case and rendered a decision on November 16, 1998. The Supreme Court recognized the tension between *Gilmer* and *Alexander*.[77] On the one hand, *Alexander* and *Gilmer* can be read together to hold "that federal forum rights cannot be waived in union-negotiated CBAs even if they can be waived in individually executed contracts - a distinction that assuredly finds support in the text of *Gilmer*."[78] In contrast, the two lines of authority can be read as an evolution in the judiciary's acceptance of increased use of arbitration, leading to a union being able to waive an employee's right to his day in court.[79] While recognizing tension in the

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70. *Brown*, 127 F.3d at 341-342. The arbitration clause contained a prohibition against discrimination "on account of race, color, creed, religion, sex (sexual harassment), age, handicap, national origin, or veteran status." *Id.* at 341.
71. *Id.* at 341-42.
72. *Id.* at 341.
73. 118 S.Ct. 1162 (1998).
74. No. 96-2850, 1997 WL 422869, at *2 (4th Cir. July 29, 1997), *vacated*, 119 S.Ct. 391 (1998).
75. *Id.*
76. *Id.*
77. 119 S.Ct. 391, 395 (1998).
78. *Id.*
79. *Id.*

precedent, the Court did nothing to break that tension. "[W]e find it unnecessary to resolve the question of the validity of a union-negotiated waiver, since it is apparent to us, on the facts and arguments presented here, that no such waiver occurred."[80] The waiver "must be clear and unmistakable."[81] The Court noted that it was unsure if *Alexander's* prohibition against waiver of a federal forum survives *Gilmer*.[82] However, *Alexander* "at least stands for the proposition that the right to a federal judicial forum is of sufficient importance to be protected against less than explicit union waiver in a CBA."[83] The Court held that the CBA here did not contain a clear and unmistakable waiver of the employee's right to sue in court for federal employment discrimination.[84]

It is with this background of cases that the Seventh Circuit was presented with *Johnson v. Bodine Electric Co.* Although the decision in *Johnson* goes along with the opinion expressed by the majority of circuits, it gives a slightly different interpretation of the requirements needed to compel arbitration of employment discrimination claims under CBAs.

IV. INSTANT DECISION

In *Johnson,*[85] the Seventh Circuit relied heavily upon its earlier decision in *Pryner*[86] in determining the outcome of the case. Both of these cases addressed the question of whether a "CBA could compel employees to arbitrate their claims under federal employment discrimination laws, such as Title VII."[87]

The court first considered the role of the CBA in the area of employment and workers' rights. The CBA is negotiated by a union, adopted by a majority of its workers, and binding upon all members.[88] The court noted that federal anti-discriminatory statutory rights are bestowed upon minority group members due to a storied history of discrimination.[89] The court stated that "[t]he employers' position delivers the enforcement of the rights of these minorities into the hands of the majority, and we do not think that this result is consistent with the policy of these statutes."[90] Thus, the court reasoned that a union cannot enter into a CBA and thereby agree, on behalf of all employees, to arbitrate statutory rights.[91]

Next, the Seventh Circuit considered whether its decision in *Pryner* was distinguishable from the facts and issues presented in the instant case. Bodine attempted to argue that in *Pryner* a worker was not allowed to raise a grievance on his own; rather, the worker had to submit his complaint to the union, who then had

80. *Id.*
81. *Id.* at 396.
82. *Id.*
83. *Id.*
84. *Id.* at 397.
85. 142 F.3d 363 (7th Cir. 1998).
86. Pryner v. Tractor Supply Co., 109 F.3d 354 (7th Cir. 1997).
87. *Johnson*, 142 F.3d at 365.
88. *Id.* (citing *Pryner*, 109 F.3d at 362-63).
89. *Id.*
90. *Id.*
91. *Id.* (citing *Pryner*, 109 F.3d at 363).

the discretion to submit a grievance.[92] In contrast, argued Bodine, under the CBA at issue, a worker was entitled to bring a grievance on his own.[93] Upon examining the CBA, the court did not find merit to this argument. The court found that the only disputes employees were entitled to bring on their own were those between the worker and union over the "handling of the system of referrals for work."[94] Any other disputes had to be first taken to the union representative on the job site, who then scheduled a meeting with a representative of management.[95] The Seventh Circuit was concerned with the level of discretion that was retained by the union. It stated, "[w]e may not assume that [the union] will be highly sensitive to . . . the interests protected by Title VII," which leads to the same "essential conflict . . . between majority and minority rights."[96] The court held that *Pryner* applies to all CBA's and does not distinguish between cases in which an employee can bring grievances and those in which the union is responsible for instituting the process.[97]

Second, Bodine tried to distinguish this case from *Pryner* by claiming that Johnson's complaint was basically centered around the CBA's layoff procedure, thus requiring an interpretation of the CBA, a matter that should be submitted to the CBA's grievance procedure.[98] The court recognized that "[i]nterpretation of the collective bargaining agreement is a question for the arbitrator,"[99] however, the court must first determine whether the claim is arbitrable, and that decision is left to the court.[100] Although there is a presumption favoring arbitrability,[101] workers cannot be forced to arbitrate their Title VII discrimination claims.[102] The court went further and stated that Johnson's complaint was not with the layoff procedures in the CBA, but, rather, that his layoff was the result of racially discriminatory reasons.[103] No provision of the CBA at issue addressed racial discrimination. Thus, Johnson could not be made to "arbitrate a matter that he [had] not agreed to arbitrate simply because it touches on a CBA provision [lay-off provision]."[104]

Finally, the court noted that both *Pryner* and this case were not concerned with whether it was appropriate to arbitrate Title VII claims, but "whether a union's

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92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.* at 366 (quoting *Pryner*, 109 F.3d at 362).
97. *Id.*

> We are not holding that workers' statutory rights are never arbitrable. They are arbitrable if the worker consents to have them arbitrated. If the worker brings suit, the employer suggests that their dispute be arbitrated, the worker agrees and the collective bargaining agreement does not preclude such side agreements, there is nothing to prevent a binding arbitration.

Id. (quoting *Pryner*, 109 F.3d at 363).
98. *Id.*
99. *Id.* (quoting United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593, 599 (1960)).
100. *Id.* (citing AT&T Techs., Inc. v. Communications Workers of Am., 475 U.S. 643, 649 (1986); John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 545 (1964)).
101. *Id.* (citing Nielson v. Piper, Jaffray & Hopwood, Inc., 66 F.3d 145, 148 (7th Cir. 1995) (citing Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983))).
102. *Id.* (citing *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974)).
103. *Id.*
104. *Id.*

agreement to an arbitration clause in a CBA constitutes consent to arbitrate individual workers' Title VII claims."[105] *Pryner* answered this question in the negative and the court noted that most circuits agree with this conclusion.[106] "Only the Fourth Circuit has held that a CBA arbitration clause can bar an individual worker's Title VII claims."[107]

The court was careful to note that this opinion and *Pryner* were not meant to suggest that arbitration is not a suitable forum for adjudication of Title VII claims. Rather, they stand only for the proposition that an employee does not consent to arbitration of his Title VII claims merely by being a party to a CBA that contains a mandatory arbitration clause.[108] An employee will not be required to arbitrate disputes he has not specifically agreed to arbitrate.[109]

V. COMMENT

The majority of federal courts and the decision in this case hold that workers are not required to arbitrate their discrimination claims despite the presence of a mandatory arbitration clause in a CBA. Only one circuit has sided with the minority view and its interpretation of the law has been considered by the U.S. Supreme Court in *Wright*.[110] The Court did not explicitly accept or reject the Fourth Circuit's interpretation that an arbitration provision in a CBA requires union employees to pursue arbitration. However, the Court did find that *Gilmer* and *Alexander* are both valid precedents; neither overruling the other.[111] The narrow opinion in *Wright* merely held that waiver of a judicial forum for employment discrimination claims had to be clear and unmistakable.[112] The Court did not address whether this union-negotiated waiver would be valid, thus leaving open the issue of whether statutory rights should be arbitrated and whether rights to a judicial forum can be waived in a CBA.[113] This issue is replete with competing policies opposing and favoring the arbitration of statutory claims.

There are three main policy arguments which support the arbitration of statutory claims. The first is a liberal policy favoring the use of arbitration in resolving disputes. Most courts recognize the importance of encouraging the use of alternative dispute resolution. The second policy argument advocates the use of arbitration in the growing field of employment discrimination claims. Norris Case, in his article

105. *Id.*
106. *See* Harrison v. Eddy Potash, Inc., 112 F.3d 1437, 1453 (10th Cir.), *vacated*, 158 F.3d 1371 (10th Cir. 1998); Penny v. United Parcel Serv., 128 F.3d 408, 414 (6th Cir. 1997); Brisentine v. Stone & Webster Eng'g Corp., 117 F.3d 519, 526 (11th Cir. 1997); Martin v. Dana Corp., No. 96-1746, 1997 WL 313054, at *8-9 (3d Cir. June 12, 1997), *reversed*, 135 F.3d 765 (3d Cir. 1997); Varner v. National Super Markets, Inc., 94 F.3d 1209, 1213 (8th Cir. 1996).
107. *Johnson*, 142 F.3d at 367; *see* Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875 (4th Cir. 1996).
108. *Johnson*, 142 F.3d at 367.
109. *Id.* at 366.
110. 119 S.Ct. 391 (1998).
111. *Id.* at 396.
112. *Id.* at 397.
113. *Id.* at 395.

on arbitration of employment discrimination claims, suggests that "[t]he expanding employment discrimination docket may have triggered the courts' frustration with litigation, and its inclination towards arbitration."[114] Finally, policy favors union involvement in arbitration. Unions can provide assistance to their employees in arbitration proceedings, help employees find attorneys to handle their claims and insure that only worthy claims are submitted.[115]

In holding that arbitration of statutory anti-discrimination claims is not required under a CBA, the majority of courts have stood behind competing policy arguments, many centering around the contractual nature of the CBA. First, under most CBA's, the arbitrator is only able to resolve contractual rights stemming from the employment, not statutory rights. Thus, an employee should be entitled to pursue judicial remedies for these statutory claims.

Second, even though employees can bring suit, they are often unable to institute an action and compel arbitration under the CBA on their own. Most agreements require the employee to take his grievance to the union representative, who then decides the propriety of bringing the claim. By allowing an employee to bring suit for discrimination claims, he is able to act independently of the union when he feels he has been wronged.

The third policy argument concentrates on the contractual nature of a CBA. By joining a union, an employee becomes subject to a vast system of laws for which he took no part in the negotiation. "The employee whose union negotiates a collective bargaining agreement containing a prohibition on discrimination and a standard grievance and arbitration provision is extremely unlikely to be aware, much less agree, that the union has negotiated away his rights to litigate a statutory discrimination claim."[116] Once a CBA has been negotiated, it must be approved by a majority of the workers in the union, however, it is binding upon all union members.[117] Thus, a CBA represents majority rights.[118] Anti-discrimination statutes protect the concerns and rights of minority workers. When an employee is compelled to arbitrate statutory discrimination claims, a conflict arises between majority and minority rights. Courts have recognized this conflict by ruling that an employee is not required to arbitrate claims that he has not specifically agreed to arbitrate. In *Pryner*, the court stated that "the union cannot consent for the employee by signing a collective bargaining agreement that consigns the enforcement of statutory rights to the union-controlled grievance and arbitration machinery created by the agreement."[119] If an employee agrees to arbitrate his statutory claims, then he will be held to his agreement. However, he will not be made to arbitrate simply because he joins a union and becomes a party to a CBA.

Finally, policies against arbitrating statutory claims focus on the purpose of non-discrimination statutes. These statutes are meant to protect workers, especially those incapable of protecting themselves. In her article on unions and employment

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114. Norris Case, *Arbitration of Workplace Discrimination Claims: Federal Law and Compulsory Arbitration*, TOURO L. REV. 839, 864 (1998).

115. Hodges, *supra* note 61, at 171.

116. *Id.* at 151.

117. *Johnson*, 142 F.3d at 365.

118. *Id.*

119. *Pryner*, 109 F.3d at 363.

discrimination, Ann C. Hodges noted that, "[t]he purposes of the non-discrimination statutes are not served by procedures and traps that make it more difficult for employees, who are often unsophisticated, to enforce their rights."[120]

Johnson and the majority of federal courts rely heavily on those policies, which do not support arbitration of statutory claims in the presence of mandatory arbitration clauses. Recurring themes throughout many of these cases include the inherent problems with the CBA, including employees unknowingly waiving their rights to a judicial remedy, the inability of arbitrators to resolve statutory rights and the inability of employees to compel arbitration on their own. It is these policies which weighed heavily in determining that mandatory arbitration clauses do not require the arbitration of statutory rights found in anti-discrimination laws.

Because many of the majority opinions focus on problems within CBA's, unions and employers may try to use creative drafting in order to limit the opportunity of employees to pursue judicial remedies. It is not unusual for unions to favor arbitration procedures which are less expensive and more efficient than their judicial counterpart. Some unions may attempt to draft a CBA which would authorize an employee to bring grievances on their own and would allow an arbitrator to resolve both statutory and contractual claims. As the Supreme Court said in *Alexander*, "[w]here the collective bargaining agreement contains a non-discrimination clause similar to Title VII, and where arbitral procedures are fair and regular, arbitration may well produce a settlement satisfactory to both employer and employee."[121] Questions still remain and "[i]t is unclear. . . whether it is possible to draft a collective-bargaining agreement that would effectively preclude a suit on a statutory claim and make arbitration the exclusive remedy for the vindication of the employee's rights."[122] When presented with these creatively drafted CBA's, some circuits continue to note the conflicting interests of the union and employees and state that, "the union cannot waive the employees' right to litigate their statutory claims."[123]

Regardless of the way future CBA's are drafted, litigation over the effect of mandatory arbitration provisions on statutory claims will persist. Much of this litigation stems from the conflicting precedent handed down by the United States Supreme Court and the lower federal courts. Although the differing opinions can be attributed to the unique factual situations presented in each case, the problems associated with conflicting opinions will not disappear until a clear rule is set forth by the Supreme Court.

The *Johnson* case makes it clear that although arbitration is not an unsuitable forum for the resolution of Title VII claims, a worker does not waive his right to a judicial forum for these claims merely by being a party to a CBA. The only way a worker can waive his rights to a judicial forum for discrimination claims is if he specifically agrees or contracts to arbitrate these claims.

The decision in the instant case and the rule followed by the majority of federal courts is the correct way to handle the competing interests of mandatory arbitration

120. Hodges, *supra* note 61, at 173.
121. *Alexander*, 415 U.S. at 55.
122. Boller & Petersen, *supra* note 63, at 86.
123. *Id.*

clauses and statutory anti-discrimination claims. Due to the inherent conflict between majority and minority rights, it is sensible to require arbitration of only those issues that the employee individually agrees to arbitrate. Many employees will not know or comprehend that their becoming a party to a CBA waives their right to judicial resolution of statutory claims. An employee will be required to arbitrate Title VII claims only by specific agreement. In the context of CBA's, where workers have virtually no voice in their negotiation, the majority rule recognizes and protects workers' rights. The minority rule, although it has been subjected to much criticism, is not without merit. The rule focuses on the worker's choice to become a member of the union and a party to the union's CBA. If the worker voluntarily agrees to the mandatory arbitration clause in the CBA, he should be forced to arbitrate. The minority rule is less protective of workers' rights than the majority rule. Considering that the purpose behind many of the employment discrimination statutes is to protect workers' rights, it is easy to understand why most federal courts favor the majority rule.

Since the Supreme Court's decision in *Alexander*, no federal court has ruled that arbitration is an unsuitable forum for resolution of employment discrimination claims. The majority rule, however, necessarily means that more of these claims will be resolved before a judge than before an arbitrator. Whether this result is viewed as a positive or negative trend depends on one's perspective. Although arbitration can be less expensive and more efficient than a lawsuit, it is also inherently defective within the context of CBAs. Arbitrators will often not have the authority to resolve statutory claims fully or provide the scope of remedies available through the court system. Also, many employees will not be able to institute arbitration on their own under a CBA, but under the majority rule, they can independently seek judicial relief. Until these problems in the CBA are addressed and corrected, most employees will pursue judicial relief and forego pursuing the union-controlled grievance procedure outlined in the CBA.

VI. CONCLUSION

Short of an agreement to specifically arbitrate employment discrimination claims, most jurisdictions hold that a worker cannot waive his right to a judicial forum simply by joining a union and becoming a party to a CBA. Although there is a universal federal policy favoring alternative dispute resolution, the United States Supreme Court and the majority of federal appellate courts have ruled that this policy does not outweigh the workers' right to pursue remedies available from a judge or jury.

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